IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 14TH JUNE 2007 / 24TH JYAISHTA 1929

WP(C).No. 23238 of 2004(N)

OS.200/1987 of ADDL.MUNSIFF COURT,CHERTHALA
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PETITIONER:

KRISHNANKUTTY NAIR,
MAPPARAMPATHU, PANAVALLY MURI, -DO- VILLAGE.

BY ADV. SRI.B.KRISHNA MANI
SMT.S.SIBHA
SRI.RAHUL VENUGOPAL

RESPONDENTS:
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1. K.K.PANKAJAM,
KARTHIKAYIL, PANAVALLY MURI, PANAVALLY VILLAGE.

2. M.R.GANDADHARAN,
MEPARAMPATHU, PANAVALLY MURI, -DO- VILLAGE.

3. M.R.RAVI OF -DO- -DO-.

4. M.R.REGHUNATHAN OF -DO- -DO-.

5. M.J.REMADEVI OF -DO- -DO-.

6. ANNAPURNESWARI OF -DO- -DO-.

BY ADV. SRI.DEEPU THANKAN
SMT.DEEPA DEEPU THANKAN
SRI.RAJESH VIJAYAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 14/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS EXHIBITS:

EXT.P1: COPY OF THE JUDGMENT DATED 11.10.2001 IN O.S.200/87 BEFORE THE ADDL. MUNSIFF, CHERTHALA.

EXT.P2: COPY OF THE PETITION DATED 28/5/2004 IN I.A.NO.1357 OF 2004 FILED BEFORE THE MUNSIFF'S COURT, CHERTHALA.

EXT.P3: COPY OF THE ORDER DATED 30.6.2004 IN I.A.NO.1357 OF 2004 FILED BEFORE THE MUNSIFF'S COURT, CHERTHALA

TRUE COPY

P.A.TO JUDGE

PIUS C. KURIAKOSE, J.

W.P.(C) No. 23238 OF 2004

Dated this the 14th day of June, 2007

JUDGMENT

The question which arises in this case is whether a legal heir of the deceased defendant who had not been brought on record as a party to the suit will be bound by the decree if the circumstances of the case indicate that such legal heir was aware of the proceedings in the suit.

2. Ext.P3 order passed by the Additional Munsiff, Cherthala dismissing an application filed by the husband of the original defendant in the suit which was one for specific performance of an agreement for sale of property is under challenge in this Writ Petition under Article 227 of the Constitution instituted by the unsuccessful applicant-husband. The suit was instituted in the year 1987 against Smt.Janakiamma, wife of the petitioner by the 1st respondent. On receiving summons, Smt.Janakiamma entered appearance and contested. Upon her demise all the five children of Smt.Janakiamma were impleaded as additional defendants and they filed a statement adopting the contentions which had been raised in the suit by their mother. The suit stood trial for 14 years and was finally decreed for specific performance on 11.10.01. Thereafter on the basis of an application filed under Section 28(3) of Specific Relief Act, sale deed was executed in favour of the 1st

respondent-plaintiff and the sale deed was pending registration. The instant application, Ext.P2 was filed by the petitioner under Section 28 (a) of the Specific Relief Act and Section 151 of the Code for an order to rescind the contract or in the alternative to rescind the decree as to convert it as one for money. The learned Munsiff after hearing parties found that there are strong circumstances to indicate that the petitioner who is the father of the five children of Smt.Janakiamma(responents 2 to 6 herein) was aware of the proceedings in the suit and also that the petitioner was substantially represented by his children in the suit. It was also found that the objective of the petitioner is only to protract the litigation further and accordingly the application was dismissed.

3. It was very strenuous arguments which were addressed before me by Sri.B. Krishna Mani, learned counsel for the petitioner. According to Mr.Krishna Mani the theory of substantial representation which had been applied by the learned Munsiff was not really applicable on the facts of the present case and at any rate there was no answer at all from the side of the plaintiff as to why the plaintiff did not implead the petitioner who was the head of the family of deceased Janakiamma. The non-impleadment was deliberate. The objective was only to foreclose the very valid contentions which the petitioner could have raised in the suit, submitted counsel. Reliance was placed by the

learned counsel on the judgments of the Supreme Court in **K.Ethirajan v. Lakshmi** [2003 (10) SCC 578] and that of this Court in **Menon v. Panchitra** [2003 (2) KLT SN 29].

4. Sri.Deepu Thankan, learned counsel for the plaintiff-1st respondent would meet the submissions of Mr.Krishna Mani on the basis of the reasons stated in Ext.P3 itself. According to Mr.Deepu this is a hard case where his client has not been able to secure the fruits of a decree obtained in a suit which was instituted two decades ago. Even in the matter of impleadment application the respondents therein who are none other than the grown up children of the present petitioner adopted all sorts of evasive tactics and the impleadment could be allowed only after 8 years of filing the application. The petitioner is a very old person living along with his children under their care in the same building. He was aware of the ongoing litigation and opted not to come on record. The instant application is a machination of the children only in their endavour to salvage the property. But in the process, the 1st respondent is prevented from realizing the fruits of the decree even after all these years of legal battle. Collusion between the petitioner-father and respondents 2 to 6, his children who are parties to the decree is transparently clear and collusion has always been condemned by courts. Any interference with the impugned order under the visitorial

jurisdiction of this Court will be unjustified since by any standard the impugned order is quite good - submitted Mr.Deepu Thankan. The learned counsel relied on two judgments which was relied on by the learned Munsiff, i.e., the judgment of the Bombay High Court in **Smt.Chhaya Vishnu Sadavarte v. Smt.Indubai & Others** [1993 (1) CCC 85] and that of the Supreme Court in **L.H. Bhat v. Yashram Vastha** [AIR 1993 SC 1587].

5. I have very anxiously considered the rival submissions made at the Bar. I have gone through the writ petition and the documents placed on record particularly Ext.P3, the impugned order and Ext.P2 the application submitted by the petitioner upon which Ext.P3 order was passed by the learned Munsiff.

6. The petitioner is an octogenarian, aged 84. The suit property belonged to Smt.Janakiamma, a marumakkathayee. She appeared in response to the summons and filed a written statement raising several contentions. She appeared through the very same learned advocate who appeared for the petitioner before the court below. Smt.Janakiamma died pending suit and obviously on the basis of a report submitted by the advocate under Order XXII Rule 10 A, the 1st respondent-plaintiff filed IA No.1481 of 1990 seeking impleadment of respondents 2 to 6 herein, the children of the deceased lady as

additional defendants in the suit. The impleadment application could be disposed of by the learned Munsiff for reasons which are any body's guess only on 18.06.00. The additionally impleaded defendants who include the three adult sons of the deceased lady did not contend that the estate of the deceased mother is survived by their father also. The petitioner even at that time was 77 years old and was residing along with the children in the Meparambathu house which was the Tharavadu house of the deceased lady. The additional defendants only adopted the contentions which were already raised by their mother. It is not contended even for a moment by the petitioner that there is any conflict of interest between his children and him in respect of the suit property. He does not allege any collusion at all between the plaintiff and his children so as to defeat his interest. He only contends that he is also a legal representative of his deceased wife and should have been impleaded along with his children. Though Mr.Krishna Mani submitted before me that the non-impleadment of the petitioner by the 1st respondent was deliberate and the objective was to prevent the petitioner from raising very valid contentions, the learned counsel has not been able to inform me as to what those valid contentions are. In fact the last sentence in paragraph 3 of Ext.P2 affidavit submitted by the petitioner before the court below is to the effect that the petitioner is

prepared to “repay the said advance amount as and when directed by this Hon’ble court”. The above sentence will show that the petitioner is admitting the agreement of sale and payment of advance which have been upheld by the trial court while passing the decree.

7. The circumstance that the additional defendants-petitioner’s children did not contend before the court that their father-the petitioner is also a necessary party to the suit being another legal representative of their deceased mother, is of moment. That circumstance according to me will show that according to the additional defendants also, their father did not have contentions to be urged in the suit other than the contentions raised by his wife which were adopted by them. If the petitioner, their father had any special contentions, capable of non-suiting the plaintiff, they would have certainly paved the way for the father raising the same by contending that their father living along with them under the same roof and sharing the same mess with them is also a necessary party. They would never have prevented their father from raising valid contentions available to him since the same will be in detriment to their own interest in the suit property. It is common interest of the petitioner and them to salvage the suit property from dispossession. The maxim ***nemo agit in seipsum*** (no one acts against himself) is applicable in this context.

8. There are several circumstances which would show that the petitioner was aware of the proceedings in the suit. As already stated, the petitioner and his children were residing in the same building and were sharing the same mess. The same counsel appeared for his deceased wife, for the children and now appears for him also. The impleadment petition filed by the 1st respondent on the basis of statements submitted by the same counsel under Rule 10 A was pending before the trial court for 8 years. The petitioner who was very old even at that time was under the care of his sons, the additional defendants. In fact a reading of the judgment which is produced as Ext.P1 will show that even the payment of advance towards agreement for sale was received not by the deceased lady but by the son. It is the receipt issued by the son which was marked as Ext.A2 in the suit which has been relied on by the trial court to hold that the cause of action alleged is established. In the affidavit in support of the instant application also the petitioner does not say that he was not aware of the pendency of the suit or the passage of decree. Instead he claims in the affidavit that he is fully conversant with the facts of the case and that his wife died during the pendency of the suit in 1992. The contention raised by him is technical in nature and the same is that the decree is null and void and not binding on him since he was not made a party to

the suit. After standing trial for about 14 years the suit was decreed in October 2001. The petitioner who claims to be fully conversant with the facts of the case does not file the present petition even at that time. He waited till a deed of sale is executed pursuant to an interlocutory application filed by the 1st respondent under Section 28(3) and registration of that deed is about to take place. The learned Munsiff has given excellent reasons to support his conclusion that the petitioner who was well aware of all the proceedings in the suit preferred to keep away from court on his own and has come forward now with the objective of dragging the litigation further so that dispossession, unpleasant to the entire family, can be avoided. The judgment of the Supreme Court in **Ethirajan**'s case (supra) and that of this Court in **Menon**'s case (supra) deal with the application of principles of res judicata and do not directly answer the conclusion of the learned Munsiff that the estate of the deceased was substantially represented in the suit by the children who were made defendants and therefore the writ petitioner cannot have a legitimate grievance on account of his non-impleadment.

9. The Supreme Court has in **Hariharan v. Valmiki Prasad Singh & others** [AIR 1975 SC 733] spoken on the theory of representation of the estate by some alone of the legal heirs of the deceased defendant. The court has held that when the persons who

according to the plaintiff are the legal representatives of deceased defendant are brought on record within the time limited by law, there is no abatement of the suit or appeal and that the impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record, binds not merely those impleaded but the entire estate including the interest of those not brought on record. The court further held that unless there is fraud or collusion or there are circumstances which indicate that there has not been a fair or real trial or that against the absentee-heir there was a special case which was not and could not be tried in the proceeding, the heirs who have been brought on record should be held to represent the entire estate including the interests of those heirs not brought on record. The court has clarified that the fraud or collusion must be between the parties brought on record and the plaintiff to the detriment of the legal representative who had not been brought on record. There is no allegation whatsoever in this case regarding any such fraud or collusion between the plaintiff and the additional defendants. On the contrary, as already stated, through his affidavit the petitioner is admitting the execution of the agreement for sale by his deceased wife, and he agrees for the conversion of the decree now passed as one for return of advance amount. On the facts of this case, the principle of substantial

representation of the estate applies and the court below was justified in holding that the estate of the deceased was represented in full including the interest of the petitioner herein by the additional defendants.

10. A learned judge of Bombay High Court had occasion to consider the question whether, when one of the legal heirs of the deceased was not brought on record, but the circumstances of the case indicate that such legal heir was aware of the suit proceedings, he will be bound by the decree even though he was not a party in the suit. In **C.V. Sadvarte v. Indubai & others** [1993 (1) CCC 85], the learned Judge held that normally only the parties to the suit are bound by decree passed in a suit. But, in certain circumstances, certain other persons who are not parties to the suit will also be bound. That was a case where the suit was one for eviction of a tenant and pending suit the tenant died and all his children except a daughter was brought on record as additional defendants. The suit was decreed. The daughter who had not been made a defendant came forward to resist the execution contending that the eviction decree is not binding on her. The court found on the evidence available in that case that this daughter was also aware of the decree and on that basis held that the decree is binding on her also though she is not a party to the decree. I have already found that circumstances obtaining in this case will establish to the very hilt

that the petitioner was aware of the proceedings in the suit including the passage of the decree and the execution of the sale deed by the court in implementation of the decree. I agree with the learned Munsiff who has stated that the very purpose of the petitioner's highly belated motion is to prevent the 1st respondent from securing the fruits of the decree obtained by her after a long drawn out legal battle. There is no warrant at all for interfering with Ext.P3 order and much less under the visitorial jurisdiction of this Court under Article 227 which will be exercised only when it can be said that the order of the Subordinate court is unreasonable to the extent of being branded as a perverse one, or is passed in violation of law statutory or settled or results in failure of justice or gross injustice.

The Writ Petition will stand dismissed. I refrain from awarding costs in deference to the enthusiastic submissions addressed before me by Mr.B.Krishna Mani.

PIUS C. KURIAKOSE, JUDGE

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